

05-707 NOV 30 2005

No.

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IN THE
Supreme Court of the United States

JAMES SHOBAR; CATHY HODGES; KELLY GORE;
CONCERNED CITIZENS OF SANTA YNEZ VALLEY,
PETITIONERS,

v.

STATE OF CALIFORNIA; ARNOLD SCHWARZENEGGER,
GOVERNOR OF CALIFORNIA,

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

BRENT HORNER
Counsel of Record
205 S. Broadway St.
Los Angeles, CA 90012
(213) 680-1716
Attorney for Petitioner

QUESTIONS PRESENTED

Does the Indian Gaming Regulatory Act, 25 U.S.C. 2710 d empower the Governor of an affected State to negotiate terms of a tribal-state compact that violate the Constitutional rights of non-Indian workers in Indian casinos and businesses which rights are established by the State's Constitution?

Is the 10th Circuit's interpretation of title 25 section 2710 d (3) correct? That is, though federal law preempts the issue of the allowing gambling on Indian lands the tribal-state compact and all of the terms to be included in a compact by that section, and the compact itself, must be "lawfully in effect", meaning lawfully according to state laws?

Are Indian tribes necessary or indispensable parties to a lawsuit brought by non-Indian citizens against their government for Declaratory Relief to interpret their rights and the State's duties under a tribal-state compact and a mandate directed to the State to enforce the terms of a tribal-state compact which were included for their benefit and protection when no tribe can be joined because of sovereign immunity and, because of the interplay between joinder rules and common law "Indian immunity doctrines," Petitioners are left with no remedy at all under either State or federal law?

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OPINIONS BELOW

On June 14th, 2005 the three judge panel assigned to this appeal entered it's unpublished memorandum opinion affirming the order of the District Court dismissing Petitioner's action without a trial or hearing on the merits. That decision is found at 1a in the Appendix hereto. The order of dismissal by the United States District Court, Central District of California the honorable Judge Manuel Real is found at 2a in the Appendix hereto.

JURISDICTION

The order affirming the dismissal was entered by the Ninth Circuit Court of Appeals on 6 July 2005. The time to seek this writ was extended when Petitioner sought Rehearing and Rehearing in Banc. The order denying Rehearing is at 3a in the Appendix hereto. This court's jurisdiction is invoked under 27 U.S.C. 1254.

RELEVANT PROVISIONS INVOLVED

10th AMENDMENT TO THE U.S. CONSTITUTION,
AND THE 14th AMENDMENT TO THE U.S.
CONSTITUTION, SEC. 1. TITLE 42 U.S.C. 1983 (See
Appendix)

STATEMENT

This case began when the former Governor of California, Gray Davis, negotiated and executed 49 identical tribal-state compacts pursuant to the authority of the Indian Gaming Regulatory Act of 1988

[IGRA] 25 U.S.C. 2710 d. and the authority of the California Government Code amended by a public initiative commonly called Proposition 5 enacted in November 1998. Just prior to executing these compacts in October, 1999 the California Supreme Court struck down the initiative amendment to the Government Code in *Hotel Employees and Restaurant Workers Union International v. Gray Davis* [Cal. Supreme Court Aug. 1999] 21 Cal. 4th 585. That amendment to the California Government Code was struck down because it violated the California State Constitution Art. 4 Section 19 which prohibited Las Vegas style Casino gambling [called class III gaming under the IGRA]. Undaunted the Governor executed the compacts anyway and the Legislature approved them and they then placed a Legislative initiative on the ballot for March of 2000 entitled Proposition 1A. That proposition was intended to amend Article 4 section 19 of the California Constitution to authorize the Governor to negotiate tribal-state compacts with recognized Indian tribes to conduct some forms of casino style, or class III gaming on existing Indian reservations, primarily slot machines and house-banked card games, subject to ratification by the State Legislature. Proposition 1A was enacted in the March 2000 election and, in effect, retroactively validated the compacts executed earlier in October, 1999. Petitioners SHOBAR, GORE and HODGES were employed at the time by an Indian casino, Petitioners Hodges and Gore as dealers in the casino being operated by the Santa Ynez Band of Mission Indians, Petitioner Shobar worked in the Security Department. Petitioners Concerned Citizens of the Santa Ynez Valley were an unincorporated association of residents in the area negatively impacted by a number of "off-site" impacts

of the gambling casino and a large expansion of it in 2002.

Factual and Procedural History

Petitioners SHOBAR, HODGES and KELLY all sustained work-related injury or illness while on the job and which would be compensable under the Workers Compensation system established by the California Constitution Article 14 Section 4 and the California Labor Code. The 1999 tribal-state compacts executed in October 1999 provided that the compacting tribe could either participate in the State's Workers' Compensation system or adopt a comparable system complete with independent tribunals to hear and resolve any disputed claims of injured workers. The purpose of the Workers' Compensation (no fault) system is to eliminate tort litigation between workers and their employers. The Santa Ynez Band of Mission Indians did not participate in the State's Workers' Compensation system. When Petitioners made claims for their injuries, they were referred to an insurance adjuster employed by a wholly Indian-owned adjusting company called Tribal First. Their claims were all denied. When they indicated they wanted to appeal that denial, they were referred back to the tribal employer. They requested an appeal but received no response. When Petitioners reviewed the tribal-state compact they learned of the provision allowing the tribes to elect to adopt their own comparable system complete with a hearing before an "independent tribunal" but that election by the compacting tribe had to be made within 60 days of the effective date of the tribal-state compact and if the tribe elected not to participate in the State system, proof of a "comparable

system" had to be furnished to the Governor within that 60-day period.

Petitioners had legal counsel write to Governor Davis by certified mail to obtain the details of the "comparable system" furnished to the State. They received no response. They had their counsel contact the adjuster, Tribal First, and request the details of whatever the tribe's system was, however the adjuster refused to disclose any information claiming "sovereign immunity".

Petitioners then filed suit in the State Superior Court solely against Governor Davis and the State of California, seeking, among other things, declaratory relief to determine what comparable system the tribe, or any tribe had adopted and whether or not the Governor or the State had any lawful authority to enter into that Workers' Compensation provision of the tribal-state compact in light of Article 14 section 4 of the California State Constitution and they sought a further determination of whether the compact was lawfully in effect given the provisions of the California Constitution which established a mandatory system for resolving the disputed claims of all injured workers in California and ultimately subjected such determination to the exclusive review of the Courts of Appeal of the State of California. When hired, Petitioner workers never waived any rights provided to workers by law. When served with Petitioner's complaint, the Governor and the State removed the case to the United States District Court before there were any State court actions and then immediately moved to dismiss Petitioner's case on the grounds that they had failed to join an indispensable or necessary party in their suit

against the Governor, namely the Indian tribe(s) and the State successfully argued Indian tribes could not be joined as a matter of law because of the common law doctrine of sovereign immunity. Petitioners simultaneously moved to remand the matter back to state court for lack of any federal question but the Court never ruled on that motion. Instead, the District Court, Judge Manuel Real presiding, dismissed Petitioner's action with prejudice on the grounds that Petitioners had failed to join a necessary or indispensable party and that they had no standing to bring a lawsuit "based upon the IGRA or the tribal-state compact." That the tribe(s) could not be joined because of sovereign immunity and, Petitioners had no standing to sue under the IGRA (although Petitioners never sued under the IGRA). Without any legal recourse to redress their injury and this denial of due process, they appealed the dismissal to the Ninth Circuit Court of Appeals who ultimately affirmed the dismissal in an unpublished memorandum decision [Appendix 1a] and then denied Petitioner's Petition for Rehearing and Rehearing En Banc.

REASONS FOR GRANTING THIS PETITION

The 10th Amendment to the United States Constitution provides that "powers not delegated to the United States **by the Constitution**, nor prohibited by it to the states, are reserved to the states respectively, **or the people.**" The 14th Amendment in relevant part provides "...nor shall any state deprive any person of life, liberty, or property without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.** Similarly title 42 U.S.C. 1983 prohibits the deprivation of civil rights by

any government or agent for a government acting under color of authority. [Emphasis added.]

Petitioners SHOBAR, HODGES and GORE were citizens of California and of the United States and as workers were and are entitled to all of the protections accorded all workers within the State of California. Congress has recognized that the area of workers compensation is within the power and control of the States under 28 U.S.C. 1445. Under the provisions of Art. 14 section 4 of the California Constitution, Petitioners are entitled to a specified due process of law to resolve their disputed claims of work injuries. Acting first under color of state law (previously declared unconstitutional) and the authority of the IGRA, 25 U.S.C. 2710 d (3)-(5) the State of California purported to give away Petitioners Workers' Compensation rights in the terms of a tribal-state class III gambling compact. Petitioners assert here neither the Governor nor the State had the authority to bargain away or waive their Constitutional rights under the authority of the IGRA in order to enter tribal-state gaming compacts.

Petitioner Concerned Citizens of Santa Ynez Valley joined in Petitioners' State Court action to determine what was meant in the compact terms and conditions, which were apparently intended to protect adjacent or nearby non-Indian communities from the negative off-site impacts of large Indian casino gambling enterprises and related businesses and the many problems they create. That section of the tribal-state compact provided that the compacting gambling tribes would "make a good faith effort to adopt the National Environmental Policy Act [NEPA] and the California Environmental Quality Act [CEQA]. It also

provided the tribes would "make a good faith effort to mitigate all negative off-site impacts" of the casinos and businesses. Petitioners Concerned Citizens of the Santa Ynez Valley alleged the tribe made no efforts at all to do these things and it appeared that the State and the Governor had not made any effort to enforce those provisions of the compact. The compact provided that any tribe who did not comply with any compact provision would be notified in writing and if it was a violation and it continued without abatement, correction or mitigation the State could take action against the tribe, even ultimately to terminate the compact in a federal lawsuit brought by the State against the offending tribe or tribes.

Also, as asserted below, the issues raised in their underlying suit against their Governor and the State, involved no federal question and was between them and their government to both clarify terms of the tribal-state compact for their benefit and, where appropriate, for the State to take actions on their behalf ex relator, to enforce the terms of the tribal-state compact affecting Petitioner's constitutional rights and statutory rights.